78-872

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

ATCHISON, TOPEKA & SANTA FE RAILWAY CO., *et al.*,
Petitioners,

v.

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

HARRY N. BABCOCK
2700 Terminal Tower
P. O. Box 6419
Cleveland, Ohio 44101

RICHARD W. KIENLE
8 North Jefferson Street
Roanoke, Virginia 24042

WILLIAM C. LEIPER
P. O. Box 536
600 Grant Street
Pittsburgh, Pa. 15230

JOHN A. DAILY
1138 Six Penn Center Plaza
Philadelphia, Pa. 19104

MICHAEL BOUDIN
TIMOTHY A. HARR
888 Sixteenth Street, N.W.
Washington, D.C. 20006

JAMES L. TAPLEY
JAMES L. HOWE, III
P. O. Box 1808
Washington, D.C. 20013

JAMES E. SYKES
222 S. Riverside Plaza
Chicago, Illinois 60606

Attorneys for the Railroads

November 1978

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases and Administrative Proceedings:

Page

STATUTES:

MISCELLANEOUS:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

ATCHISON, TOPEKA & SANTA FE RAILWAY CO., *et al.*,
Petitioners,

v.

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, the principal Western, Eastern, and Southern railroads in the United States listed in Appendix A ("the railroads"),[1] request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The August 2, 1978, opinion of the Court of Appeals, which is not yet officially reported, appears as Appen-

---

[1] The appendices are separately bound in a companion volume cited as "Pet. App. ——."

dix B to this petition.[2] The Court of Appeals' subsequent October 16, 1978, order and *per curiam* opinion modifying the August 2 opinion, and Judge Leventhal's dissent, which are not officially reported, appear in Appendix C. The February 4, 1977, decision of the Interstate Commerce Commission, which is reported at 356 I.C.C. 114, appears as Appendix D.

JURISDICTION

The judgment of the Court of Appeals, which was entered on August 2, 1978, appears as Appendix E. A timely petition for rehearing was decided by an order dated October 16, 1978, which appears as Appendix C. Mr. Chief Justice Burger extended the time for filing this petition for certiorari to and including November 30, 1978, by an order entered on October 30, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The Interstate Commerce Commission, after a full year of investigation including preparation of a detailed environmental impact statement, concluded that the railroad rate structure for recyclables does not unjustly discriminate, is generally reasonable, and does not significantly affect the level of recycling. The questions presented are:

1. Whether the lower court unlawfully usurped the substantive authority reserved to the Commission, and violated the standard of judicial review established in

[2] Chief Judge Wright, joined by Judges Leventhal and Swygert. The August 2, 1978, decision ("slip op.") appears as Appendix B together with the orders of August 7, August 25, and September 6, 1978, correcting the opinion.

this Court, by overturning the Commission's decision which applied proper legal standards and was supported by detailed evidentiary findings and rational analysis.

2. Whether the lower court unlawfully usurped procedural authority reserved to the Commission, and disregarded controlling decisions of this Court, by ordering the Commission to complete the remand proceeding within six months, without any evidence that such a time limit is warranted or practicable.

STATUTE INVOLVED

Section 204 of the Railroad Revitalization and Regulatory Reform Act of 1976, 90 Stat. 31, appears as Appendix F.

STATEMENT OF FACTS

A. The 4R Act and Prior Commission Proceedings

In the decade prior to 1975, the financial plight of many of the nation's railroads had become desperate: a number of railroads became bankrupt, including the giant Penn Central, and the nation's railroads as a whole had not had an annual rate of return higher than 3 percent since 1966. Association of American Railroads, *Yearbook of Railroad Facts* 20 (1977). In 1975, both houses of Congress conducted major investigations into the state of the railroads. The senators found that "[e]ight major carriers in the Northeast and Midwest are bankrupt; several elsewhere . . . are in precarious financial condition . . . ." S. Rep. No. 94-499, 94th Cong., 1st Sess. 3 (1975). In the House, the members similarly found that "there are 21 . . . railroads whose financial conditions are at best, marginal" and that "railroads throughout the nation" showed the "same signs" of decay shown earlier by bankrupt rail-

roads. H. Rep. No. 94-725, 94th Cong., 1st Sess. 80-81 (1975).

In order to bolster the railroads, Congress on February 5, 1976, passed the Railroad Revitalization and Regulatory Reform Act ("4R Act"). The 4R Act contained several measures designed to assist in revitalizing the nation's railroads. For example, it directed the Interstate Commerce Commission to give the railroads greater rate flexibility (Section 202), to assist the railroads to achieve adequate revenue levels (Section 205), and to consider authorizing selective exemptions from the Interstate Commerce Act itself (Section 207).[3]

The 4R Act also included a section concerning railroad rates on recyclables, Section 204. The ICC has consistently found after careful study that rate adjustments on recyclables were reasonable and were not discriminating against recyclables. Its determinations are reflected in general revenue decisions,[4] in special investigations,[5] and in detailed environmental impact statements approved by this Court and the Court of Appeals.[6] In these same proceedings, the ICC has also

[3] See 49 U.S.C. §§ 10727, 10728 (§ 202); 49 U.S.C. § 10704(a)(2) (§ 205); 49 U.S.C. § 10505 (§ 207).

[4] *E.g.*, *Ex Parte No. 281*, 341 I.C.C. 290 (1972), sustained in *Aberdeen & R.R.R.* v. *SCRAP*, 422 U.S. 289 (1975) ("*SCRAP II*"); *Ex Parte No. 295 (Sub No. 1)*, 344 I.C.C. 589 (1973), and *Ex Parte No. 299*, 350 I.C.C. 673 (1975), both sustained in *NARI* v. *United States*, consolidated in *Asphalt Roofing Mfg. Ass'n* v. *ICC*, 567 F.2d 994 (D.C. Cir. 1977).

[5] *E.g.*, *Ex Parte No. 270 (Sub Nos. 5 and 6)*, 345 I.C.C. 548 (1976).

[6] *E.g.*, the detailed environmental impact statements in *Ex Parte No. 281*, approved by this Court in *SCRAP II*, and *Ex Parte No. 295 (Sub No. 1)*, approved by the Court of Appeals in *Asphalt Roofing*. An impact statement was also prepared in *Ex Parte No. 270 (Sub Nos. 5 and 6)*.

found that railroad rate changes do not significantly affect the movement or utilization of recyclables. See p. 4, n. 6, above.

Unable to prevail in the ICC under the existing statutory standards of reasonableness and discrimination, the recycling interests sought to persuade Congress to alter existing rate-making standards to benefit recyclables.[7] Rejecting such attempts, Congress in Section 204 simply directed the ICC to make a broad investigation of railroad rates for recyclables to determine whether the rate structure was reasonable and non-discriminatory. The legislators refused to require preferential rates for recyclables or to enact any congressional findings or presumptions impairing the lawfulness of the recyclable rates. Congress left the evaluation of the rate structure to the expert agency (Section 204(a)(2)), on the understanding that the agency would make its determinations "consistent with the existing rules of rate-making . . . ." S. Rep. No. 94-499, *supra*, at 51.

B. Ex Parte No. 319

Section 204 provided that the investigation should be completed within one year. Following enactment of the 4R Act, the Commission promptly issued an order

[7] See, *e.g.*, *Hearings before the Subcommittee on Environment of the Senate Committee on Commerce on S. 1122, S. 1593, S. 1816, S. 1879, and S. 2753*, 93d Cong., 1st Sess. (1973). Proposed bills would, for example, have required recyclables to be transported at the "lowest possible" lawful rates, created Congressional findings of discrimination against recyclables, or created statutory presumptions of competition between recyclable and non-recyclable commodities. See, *e.g.*, S. 2753, 93d Cong., 1st Sess.; S. 1122, 93d Cong., 1st Sess.; H.R. 12536, 93d Cong., 2d Sess. Congress enacted none of these proposals.

delineating the scope and format of its investigation, which it styled *Ex Parte No. 319*. Recognizing that the railroads bore the burden of proof under the statute (Section 204(a)), the ICC required that the railroads submit detailed evidence of sample movements of the commodities to be investigated. This included identifying, costing and analyzing over 3,000 repetitive movements of recyclable and virgin commodities. Ultimately, the railroads submitted literally thousands of pages of evidence, testimony and data.

In addition to evidence of costs and revenues for individual movements, the railroads submitted detailed evidence on the history of the rate structure for different recyclables and for other commodities; on actual past experience reflecting the lack of impact of rate changes on recyclable movement and use; on the ratio of the transportation charges to the value of the commodities; on the transportation characteristics of the commodities; and on the manufacturing and distribution of the commodities. The railroads also introduced a detailed analysis of the transportation demand elasticity of recyclables,[8] prepared by an independent, expert consulting firm.

A number of important facts emerged from this extensive evidentiary presentation: First, despite rate increases, the railroads' volume of recyclable traffic has actually increased significantly more than the volume of all other traffic. Second, the elasticity of transportation demand for recyclables—the potential impact of

[8] Transportation demand elasticity is the percentage change in movement of recyclables that would result from a percentage change in railroad rates. In effect, it represents an evaluation of the potential impact of rate changes on recyclable movements.

railroad rate changes on the movement of recyclables —was extremely low.[9] Third, for technological and other reasons, recyclable commodities cannot generally be used in place of virgin commodities and there is little actual competition between recyclables and virgin commodities. Fourth, the transportation characteristics of recyclables are such that it often costs considerably more to ship recyclables than to ship virgin materials which move over fixed routes in vast quantities.

The Commission held extensive hearings in which the shippers of recyclables cross-examined the railroad witnesses at length. Briefs were filed by the major parties. A draft environmental impact statement was prepared and released by the ICC, concluding that the railroad rate structure did not significantly affect the level of recycling. Comments on the draft were submitted by the parties, and by the Environmental Protection Agency, which accorded the draft impact statement its highest rating: Adequate and without objections. The ICC released its final 200-page environmental impact statement on January 4, 1977, reaffirming its initial conclusion.[10]

On February 4, 1977, the ICC released its decision. 356 I.C.C. 114 (Pet. App. 4d). This decision, repre-

[9] Where the impact of railroad rate changes on movement is low or insignificant, then the impact of such changes on the level of actual recycling is at least equally low. The impact may be even lower since some of the recycling may not depend on transportation at all. See, *e.g.*, 356 I.C.C. at 193 (Pet. App. 83d): "Home scrap [utilized in the plant that creates it] represents approximately 61 percent of all scrap consumed by the steel industry" and "all of it is recycled."

[10] The "executive summary" of the final impact statement is reprinted as Appendix G.

senting the most extensive analysis of the rate structure for recyclables ever undertaken, concluded that the railroads had met their burden of proof in demonstrating the non-discriminatory character of the rate structure for recyclables. It further concluded that in most cases the rate structure for recyclables had been shown to be just and reasonable; but in a few instances it found that the railroads had failed to justify the rate level in a particular region for a particular recyclable and it ordered an adjustment. The ICC's decision in *Ex Parte No. 319* includes over 40 pages of discussion of general issues relating to the evidence, the methods of analysis and the legal standards (356 I.C.C. at 117-160 (Pet. App. 7d-50d)), and 270 pages of detailed discussion and expert analysis of each of the categories of recyclable commodities and their virgin counterparts.[11] 356 I.C.C. at 160-430 (Pet. App. 50d-320d).

C. The Court of Appeals Decision

National Association of Recycling Industries ("NARI") and Institute of Scrap Iron and Steel ("ISIS") sought review of the Commission's decision in the Court of Appeals.[12] The United States, acknowledging the Commission's expertise in matters of fact finding and analysis, challenged its decision on assert-

[11] The discussion of individual commodities covers such matters as the collection, production and marketing methods for recyclables; the volume and movement patterns; the rate structure; the historical effect of rate changes on movements; revenue and cost figures; the transportation characteristics of the commodity; elasticity of transportation demand; special environmental considerations; and the comments of both shippers and railroads.

[12] Jurisdiction in the lower court was asserted under 28 U.S.C. § 2341 *et seq.*, and the *NARI* and *ISIS* suits were consolidated.

edly legal grounds.[13] Most important, the United States and ISIS argued that Congress in Section 204 of the 4R Act had enacted new substantive legal standards for rate discrimination, and NARI argued that Congress intended to create a statutory presumption of competition between recyclables and non-recyclables. It was also asserted that the ICC had placed the burden of proof on the recyclers rather than the railroads.

The ICC and the railroads responded that no substantive change in the law had been enacted. Congress

had in fact required extensive evidentiary submissions by the railroads.

The Court of Appeals on August 2, 1978, overturned the Commission's decision. In an opinion by Chief Judge Wright (Pet. App. 1b), the court conceded that the ICC had acted properly in applying traditional standards of reasonableness and discrimination (slip op. 21-22 (Pet. App. 25b-26b)), and it agreed that Congress had not enacted a statutory presumption of competition. Slip op. 37 (Pet. App. 41b). The court's opinion was thus primarily a series of disagreements with the Commission's factual evaluation of the rates under the traditional legal standards. *E.g.*, slip op. 28, 29, 30, 32 n.78, 36, 39 (Pet. App. 32b, 33b, 36b n.78, 40b, 43b). The lower court remanded the case to the Commission to investigate and analyze again the same issues already studied for a year under the same legal standards.

On August 15, 1978, NARI filed a petition for rehearing seeking to modify the decision by requiring the ICC to complete its remand within six months. The Commission and the railroads opposed this petition, the railroads pointing out that there was no basis for such a limit and that an arbitrary six-month deadline threatened to deny the railroads a fair opportunity to meet their burden of proof. Nevertheless, the Court of Appeals on October 16, 1978, issued a *per curiam* decision (Pet. App. 1c), Judge Leventhal dissenting (Pet. App. 2c-3c), imposing a six-month deadline on the remand. Pet. App. 1c. The court made no response to the objections raised by the ICC and the railroads and cited no basis for its decision that the investigation could be carried out within the imposed time limit.

ARGUMENT

The lower court's decision disregards the proper standard of judicial review repeatedly affirmed by this Court and is a patent substitution of the lower court's policy preferences for the expert appraisal of the agency. The approach taken and the error committed below are virtually the same ones which led this Court to reverse the lower court in the *SCRAP* litigation. *E.g.*, *SCRAP II*, 422 U.S. at 322. In addition, paralleling the lower court's usurpation of the agency's substantive authority, the lower court has also erred by dictating the time frame for accomplishing the remand. This Court has repeatedly held that internal procedural matters are properly within the agency's exclusive authority. *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326 (1976).

The importance of this case dwarfs the prior *SCRAP* litigation, where this Court repeatedly saw fit to review and reverse the lower court's actions:[15] its scope is limited not to a single rate adjustment on recyclables but includes the entire railroad rate structure on recyclables throughout the United States. The lower court's decision not only invades agency authority but threatens vitally needed railroad revenues and thus the ability of the railroads to provide efficient transportation service, including transportation for recyclables. Because of the nature of the lower court's remand, certio-

[15] In the prior *SCRAP* litigation, this Court overturned the decisions below three times in succession, twice in full opinions (*United States* v. *SCRAP*, 412 U.S. 669 (1973) ("*SCRAP I*") and *SCRAP II*, *supra*), and once by summarily vacating the decision below (*Aberdeen & R.R.R.* v. *SCRAP*, 414 U.S. 1035 (1973)).

rari now is essential to provide effective review and to assure respect for Congress' purpose in enacting the 4R Act.

I. The Lower Court's Remand Disregards the Proper Standard of Judicial Review by Seeking To Reweigh the Evidence and Substitute the Court's Judgment for That of the Expert Agency.

Rejecting the position of the United States,[16] the lower court conceded that the Commission correctly determined to apply traditional legal standards in finding that the rate structure on recyclables is reasonable and not unjustly discriminatory. The legislative history of Section 204 clearly stated that the investigation was to proceed "consistent with the existing rules of ratemaking" (S. Rep. No. 94-499, *supra*, at 51) and nothing in the statute's language suggested a change in substantive standards. The lower court was therefore compelled to rule that "the Commission was clearly authorized by Section 204 to apply traditional ratemaking criteria in this investigation." Slip op. 27 (Pet. App. 31b). Thus, the court's remand cannot be defended on the ground that the Commission committed legal error by misapprehending the substantive legal standards to be applied.

Similarly, although the lower court referred repeatedly to the burden of proof, the Commission expressly acknowledged that the burden lay upon the railroads to

[16] The United States argued that Congress had implicitly altered the traditional test of discrimination and made cost the only factor that could justify rate differentials between recyclables and nonrecyclables. This argument rested importantly on a single scrap of legislative history constructed by one senator whom even the lower court in other discussion refused to credit. See slip op. 37 n.83 (Pet. App. 41b n.83).

justify their rate structure. 356 I.C.C. at 427 (Pet. App. 317d). The Commission couched its findings in terms of what the railroads affirmatively proved and, where the Commission found that the railroads had not carried their burden of proof on an issue, it made this failure the basis for resolving the issue against the railroads. See p. 9, above. Hence, insofar as the lower court asserts that the Commission relieved the railroads of their burden of proof, this is not a legal disagreement about the location of the burden of proof but a determination by the lower court that it did not agree that the evidence supported the Commission's determination on a particular issue.

This Court, however, has repeatedly held that lower courts are not entitled to reweigh the evidence or substitute their evaluation of the evidence for that of the expert agency:

> "The very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed." [17]

For this reason, Justice Brandeis declared many years ago, "to consider the weight of the evidence before the Commission . . . is beyond our province . . . ." [18] This Court has repeatedly applied this principle to prevent judicial erosion of the authority of the ICC.[19] Nor is the

[17] *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344, 352 (1940).

[18] *Virginia Ry.* v. *United States*, 272 U.S. 658, 663 (1926).

[19] *E.g.*, *Bowman Transp., Inc.* v. *Ark.-Best Freight System*, 419 U.S. 281 (1974); *United States* v. *Pierce Auto Lines*, 327 U.S. 515

principle restricting judicial review altered by the nature of the recyclers' environmental claims, for a court is not entitled to "substitute its judgment for that of an agency as to the environmental consequences of its actions." [20]

What the lower court did in this case was nothing other than to reweigh the evidence and choose to give more or less emphasis to one piece of evidence or factor in the ratemaking equation. For example, the lower court asserted that the Commission had failed to give adequate consideration to cost evidence in determining the reasonableness of the rate structure (slip op. 27, 33 n.78 (Pet. App. 31b, 37b n.78)); but in fact, an immense portion of the record related to the cost of handling recyclables and this evidence clearly was considered by the Commission.[21] The question how much weight should be given to evidence on a particular element in the equation, among the many factors that are pertinent in determining the reasonableness of rates, is precisely the kind of judgment that is committed to the agency and not to the court.[22]

(1946); *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297 (1937); *New England Divisions Case*, 261 U.S. 184, 203-04 (1923).

[20] *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

[21] One of the railroads' principal efforts—in addition to compiling extensive historical data on rates and movements and commissioning an independent study of transportation demand elasticity—was the determination of costs on almost 3,000 representative movements. See the Commission's discussion of this evidence at 356 I.C.C. at 128-40 (Pet. App. 18d-30d).

[22] As this Court stated, the "mere sample of factors that have to be considered in rate cases demonstrates the absolute necessity for considerable flexibility in rate making." *Baltimore & O. R.R.* v. *United States*, 345 U.S. 146, 150 (1953). The lower court similarly erred in asserting that the Commission limited its consideration of factors to the impact of the rates on movement. The Commission in fact discussed a range of factors including value of service, competition, and transportation characteristics. *E.g.*, 356 I.C.C. 297, 232, 164 (Pet. App. 187d, 122d, 54d).

Similarly, the lower court asserted that the agency decision did not give adequate attention to the "potential" impact of the rate structure on the movement of recyclables. Slip. op. 38 (Pet. App. 42b). See also slip op. 28, 39 (Pet. App. 32b, 43b). Yet transportation demand elasticity, which was the subject of extensive evidence and was relied on directly by the Commission, is nothing other than a measure of the potential impact of the existing rate structure on the movement of recyclables. The Commission expressly found, based on econometric analysis, that the rate structure has no significant impact on the movement of recyclables because even very substantial increases or decreases in rates on recyclables do not significantly alter the quantity of recyclable traffic.[23] Since transportation demand elasticity *is* the measure of potential impact, the lower court's assertion is simply baffling.

In yet another reweighing of the evidence, the Commission was criticized by the lower court for allegedly

---

[23] These findings are conveniently summarized in the environmental impact statement (Pet. App. 2g-3g), and the elasticity issue is discussed at various points in the Commission's decision. *E.g.*, 356 I.C.C. at 205 (Pet. App. 95d). There are various reasons why the movement and use of recyclables tends to be inelastic, in relation to freight rate changes, which are reflected in the evidentiary submissions. Merely as examples, the demand for a recyclable may be fixed by far more important variables, or the transportation cost may be a minute fraction of the selling price, or limitations on supply may preclude increased transportation even if the transportation rate falls very significantly.

giving too much weight to a report, prepared by an independent research firm, which was devoted to the very subject of transportation demand elasticity. Slip op. 30 (Pet. App. 34b). Ironically, this study, which the lower court says was overvalued, is directed to the very subject which the lower court said was given too little consideration by the Commission, namely, the potential impact of rate changes on recyclables. What compounds the lower court's error is the fact that the Commission itself said that it was going to give only limited weight to the report (356 I.C.C. at 144-51 (Pet. App. 34d-41d)) and in fact the Commission rested its evaluation of potential impact on its own independent elasticity analysis. See Pet. App. 2g-3g.

Although the lower court's catalogue of errors could be enlarged, the conclusion is clear: The lower court here engaged in a straightforward reweighing of the evidence contrary to the principle that the reviewing court "is not empowered to substitute its judgment for that of the agency." [24] The very errors committed by the lower court in this case—including its apparent unawareness of evidence in the record and its misunderstanding of the evidence discussed—furnish reasons why, under proper standards of judicial review, the evaluation and weighing of evidence is reserved to the agency.

The lower court's disregard of this principle is a repetition of its error in *SCRAP II*. There, after the Commission evaluated the impact of a railroad rate adjustment on recyclables, Judge Wright found the

[24] *Bowman Transp., Inc.* v. *Ark.-Best Freight System, supra*, 419 U.S. at 285, quoting *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971).

analysis insufficient and remanded for further proceedings. On review in this Court, the railroads argued that "the court below simply disagreed with [the Commission's] decision not to prevent . . . [rate increases] on recyclables." 422 U.S. at 322. This Court stated that "[w]e substantially agree with this position" (*id.*) and reversed the lower court, making clear this Court's displeasure with the lower court's attempt to override reasoned ICC determinations made within the agency's area of authority and expertise. *Id.* at 326-27. The Commission's discussion in the present case is even more elaborate and sophisticated than the environmental impact statement sustained in *SCRAP II*.

The Commission's decision in this case is carefully reasoned, is supported by detailed findings based on extensive evidence, and is consistent with numerous prior determinations. Under the standard of judicial review repeatedly applied by this Court, the agency decision should have been affirmed by the lower court as a reasoned exercise of Commission expertise and discretion, whether or not it is necessarily the same "decision [that] the judges of the Court of Appeals . . . would have reached had they been members of the decisionmaking unit of the agency." *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 435 U.S. 519, 558 (1978). The disregard of the established judicial review standard by the lower court and its substitution of its own policy preferences amply warrant certiorari.

II. The Lower Court's Imposition of a Six-Month Deadline on Remand Is Directly Inconsistent With Decisions of This Court Preserving the Agency's Procedural Authority.

This Court has insisted not only that lower courts respect the agencies' substantive authority but also the

agencies' mandate to structure their own internal procedures. As this Court recently said in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, supra,* 435 U.S. at 543-44:

> "[T]his much is absolutely clear. Absent constitutional constraints or extremely compelling circumstances the 'administrative agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties."' *FCC* v. *Schreiber,* 381 U.S. 279, 290 (1965), quoting from *FCC* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 143 (1940)."

This basic principle was clearly ignored by the lower court in this case. Over Judge Leventhal's dissent, Chief Judge Wright has summarily directed that the remand ordered by the court be accomplished in six months. This order was entered, at the behest of a self-interested party, without any justification for imposing *any* deadline on the Commission; and certainly no justification exists or has been offered to support the selection of a six-month period. The lower court's error in both respects is readily demonstrated.

Assuming that a court were ever justified in dictating the time period for agency proceedings, a clear precondition would be a showing that the agency would not otherwise act within a reasonable time.[25] The Commission in *Ex Parte No. 319* has shown no evidence of unreasonable delay. Congress gave the Commission a year to complete its proceeding under Section 204 and the Commission met that deadline, despite the extreme difficulty of accomplishing all of the necessary steps in that time frame.[26]

Similarly, assuming that any time limit was justified in this case, there is no basis whatever for imposing a six-month deadline. The lower court did not request a proposed time schedule from the Commission:[27] and the Commission itself explicitly opposed the six-month period suggested by NARI because it would interfere with the careful analysis and consideration required in further proceedings.[28] The court's deadline is thus not

---

[25] Since this Court held in *Vermont Yankee* that interference with agency procedures could be justified only by "extremely compelling circumstances" (435 U.S. at 543), a further precondition must be a threat of serious irreparable injury in the absence of prompt action. Here, there is no prospect of harm to recyclables in view of the unimpeached determinations of the Commission, consistent with numerous prior findings, that railroad rates do not significantly affect the movement of recyclables.

[26] Within one year the Commission had to determine the products, issues, and format of evidence; the railroads and other parties had to collect the voluminous evidence, which involved a number of individual studies in addition to the accumulation of existing data; the evidence had to be reduced to statement form and submitted; an opportunity was provided to file reply and supplemental statements; a draft environmental statement had to be prepared and circulated for comment; recycling interests were afforded extensive opportunity to conduct oral cross-examination in order to test the railroads' evidence; briefs had to be submitted by the parties to focus the evidence and place it in a legal framework; a final environmental impact statement had to be prepared prior to or in conjunction with the decision on the merits; and the Commission's own decision, covering a vast array of commodities and voluminous evidence, had to be drafted.

[27] By contrast, in *Nader* v. *FCC,* 520 F.2d 182, 207 (D.C. Cir. 1975), following years of agency delay, a different panel of the lower court directed merely that the Federal Communications Commission submit to the court a schedule for resolution of the proceeding.

[28] Response of the Interstate Commerce Commission, August 25, 1978, pp. 1, 3. The lower court did not even purport to explain why it thought the Commission could complete the proceedings in

only an invasion of agency authority, but a wholly arbitrary and capricious act which, if committed by an agency, would have been roundly criticized by the lower court.

It is not the Commission but the railroads which are the primary victims of this unlawful constraint on the content of further proceedings. Since under Section 204 the railroads bear the burden of proof, any artificial deadline impairs the railroads' ability to meet this burden and to justify their rate structure. Of course, the railroads can ultimately seek review from an adverse Commission decision, arguing that they have been unfairly prejudiced by the deadline; but the railroads' argument would be made to the very court that has imposed the deadline and has prejudged the question whether the deadline is an appropriate one.

The lower court's action is in direct defiance of the general principle articulated by this Court in *Vermont Yankee*. See p. 18, above. It conflicts with the decisions of other courts of appeals that have respected the agency's authority to control questions of timing for their own proceedings.[29] Most remarkably, the

six months. As Judge Leventhal noted in his dissent: "The court's order presupposes a capacity to judge how long this investigation should take, and I have no basis for reasoned judgment on that score." Pet. App. 3c. Indeed, the six-month period is not even an exercise of the court's independent judgment; it is simply the figure suggested by NARI, which is hardly a disinterested commentator.

[29] For example, in *Chromcraft Corp.* v. *Equal Employment Opportunity Commission*, 465 F.2d 745, 748 (5th Cir. 1972), the court indicated that because of the "discretion" and "experience-gained expertise" of the agency, the courts should not substitute their judgment for that of the agency, absent "proof of a dilatory

lower court's action is in direct conflict with a holding of another recent decision of this Court, quoted in *Vermont Yankee*, treating the very question of time restrictions in court-ordered remands of agency proceedings. In *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976), this Court stated:

> "At least in the absence of substantial justification for doing otherwise, *a reviewing court may not, after determining that additional evidence is requisite for adequate review, proceed by dictating to the agency the methods, procedures and time dimensions of the needed inquiry* and ordering the results to be reported to the court without opportunity for further consideration on the basis of new evidence by the agency. Such a procedure clearly runs the risk of 'propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency.' *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947)." (Emphasis added.)

In short, as in *Vermont Yankee*, "[a]gain the Court of Appeals has unjustifiably intruded into the administrative process." 435 U.S. at 556. The lower court's error in dictating agency procedure provides an independent basis for certiorari.

III. The Importance of This Case and the Nature of the Lower Court's Remand Warrant Certiorari Prior to Any Further Agency Proceedings.

This Court has in the *SCRAP* litigation previously recognized the importance of the present controversy

attitude on the part of the Commission or its staff . . . ." See also *Nader* v. *FCC*, *supra*, 520 F.2d at 207.

by reviewing—and reversing—three prior attempts of the lower court to usurp agency authority over recyclable rates. See p. 11, above. This case is in substance a continuation of the prior litigation but it is, if anything, even more important. The earlier actions involved individual rate adjustments (*e.g.*, the 4 percent adjustment in *Ex Parte No. 281*), whereas the present case involves the entire rate structure on recyclable commodities and not merely a single rate change of limited scope.

The fact that the lower court has ordered a remand for further agency proceedings does not diminish, but rather enhances, the urgency of immediate review. Although the remand is cast in neutral form, the content of the lower court's decision exerts manifest pressure on the Commission to alter its determinations. Once the true nature of this remand is understood, it becomes apparent that review *now* is essential to protect the railroads' legitimate interest in judicial review and in maintenance of their lawful rate structure.

In ordinary judicial review of agency action, the "function of the reviewing court ends when an error of law is laid bare" and the agency is entitled on remand to reaffirm its original result free of dictation by the reviewing court.[30] This Court has been sensitive to, and repeatedly disapproved of, attempts by lower courts to warp or to preordain the result in a remand

[30] See *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 21 (1952). Accord, *Arrow Transp. Co.* v. *Cincinnati, N.O. & T.P. Ry.*, 379 U.S. 642 (1965); *United States* v. *Saskatchewan Minerals*, 385 U.S. 94 (1966).

proceeding.[31] In this case, however, the lower court's remand decision is freighted with phrasings, observations, suggestions and instructions which amply reveal the lower court's own preferences and intentions. Two examples will suffice to indicate the true thrust of the remand.

One of the central findings in the Commission decision in *Ex Parte No. 319* was that rate relationships between recyclables and non-recyclables did not inflict competitive injury on the recyclables.[32] In this case, there was massive evidence that the rate relationships did not inflict competitive injury on recyclables. This evidence included technological evidence that recyclables and non-recyclables are not direct substitutes, historical evidence showing traffic growth for recyclables and the lack of impact of past rate changes, and studies previously referred to evidencing inelasticity of transportation demand. Yet the lower court, in ordering a remand, announced that it was "[u]nable to discern from this record any support for the Commission's

[31] See, *e.g.*, *Atchison, T. & S.F. Ry.* v. *Wichita Board of Trade*, 412 U.S. 800, 821 (1973). See also *FPC* v. *Transcontinental Gas Pipe Line Corp.*, *supra*, 423 U.S. at 333-34, quoted at p. 21, above; *SEC* v. *Chenery Corp.*, 332 U.S. 194, 200 (1947).

[32] Under the anti-discrimination provisions of the Interstate Commerce Act which are applicable where two different commodities are being compared, no unlawful discrimination can be found unless such a competitive relationship between the commodities is first established. See, *e.g.*, *Chicago & E.I. R.R.* v. *United States*, 384 F. Supp. 298, 300-01 (N.D. Ill. 1974), *aff'd per curiam*, 421 U.S. 956 (1975). The presence of competitive injury does not itself establish unlawful discrimination but requires that rate disparities be justified under recognized criteria; on the other hand, a determination that no competitive injury exists terminates the inquiry. *Id.*

findings on the discrimination issues," and that "only extraordinary circumstances, not disclosed by this record, will warrant another effort by the Commission" to reaffirm its original conclusions. Slip op. at 39-40 (Pet. App. 43b-44b). Having declared that the overwhelming evidence already in the record is insufficient to show a lack of competitive injury, the lower court is plainly implying that no amount of evidence can ever satisfy it.

On another issue of general importance, the historical evidence and the Commission's elasticity studies clearly showed that the impact of the rates on recycling was insignificant. See Pet. App. 95d, 2g. Brushing aside this determination and ordering further proceedings, the lower court announced that the railroads "should at a minimum be required to survey existing and potential users of recyclables to determine whether reductions in rates would encourage them to purchase more or make additional use of recyclable materials." Slip op. 40 n.87 (Pet. App. 44b n.87). Yet, such a survey can only produce biased results favorable to recyclers,[33] quite apart from the fact that the lower court is not entitled to decide what class of surveys should or should not be conducted in the remand proceeding.

Repeated comments and directions of this kind in the opinion below cannot be cloaked or camouflaged by general statements of the lower court that it is not telling the Commission how to decide the case. The lower

[33] Such a survey would virtually amount to asking shippers whether they would like lower rates, and the answers would be a patently unreliable guide to whether recycling would be stimulated by lower rates. The evidence that is reliable, such as actual evidence of shipper reaction to past rate changes and econometric studies, is the evidence that the lower court has ignored. See p. 15, above.

court's decision plainly violates the settled principle of *Idaho Power* and *Chenery* which forbids a reviewing court to impose, in the course of a remand, limitations on the way in which the agency shall exercise its judgment in the area committed to its discretion. While these limitations imposed by the lower court here are an additional reason for certiorari, they are equally pertinent in emphasizing why immediate review by this Court is essential and why a deferral of review is inadequate to protect the railroads' legitimate rights.

If the case is returned to the Commission in its present posture, the Commission will be under continuing pressure not merely to supplement its evidence and reexamine its conclusions but to reach a different result. If it yields to that pressure, the railroads will be seriously handicapped in a subsequent appeal to the lower court which has clearly indicated its own policy preferences. This concern is buttressed by the fact that the lower court, when it is satisfied with the agency's result, is itself extraordinarily quick to invoke the ICC's expertise, the breadth of agency discretion in fact-finding and analysis, and the limited role of judicial review in appraising such determination.[34] If review of the lower

[34] Only recently, in sustaining a number of ICC rules under the 4R Act, the lower court emphasized that the Commission's views "are entitled to deference, even on the issues of law involved in statutory interpretation." *Atchison, T. & S.F. Ry.* v. *ICC*, Nos. 76-2048, 76-2070, D.C. Cir. May 2, 1978, p. 12. The lower court's decision there repeatedly refers to "the reasonable discretion of the Commission in implementing [4R] Act," "deferral to the Commission's view," and the reasonable exercise of "the Commission's discretion." *Id.* at 20, 22. The lower court concluded: "Overall, the Court's role is one of deference and deferral" and "the Commission's effort in fulfilling this task deserves approval, for the most part, when judged under the deferential standard to which it is entitled." *Id.* at 34-35.

court's action in setting aside the *Ex Parte No. 319* decision is to be meaningful, it must come now.

Any such coerced about-face by the Commission is especially threatening because the recycling interests are utilizing this proceeding to seek significant alterations in the rate structure, depriving the railroads of desperately needed revenues.[35] Yet, a central purpose of the 4R Act is to improve the railroad industry's dire financial position (see pp. 3-4, above) and, as Justice White previously observed, "failure to maintain this country's railroads even in their present anemic condition will guarantee that recyclable materials will stay where they are—far beyond the reach of recycling plants that as a consequence may not be built at all." *SCRAP I*, 412 U.S. at 724 (White, J., concurring in part and dissenting in part).

The Commission has repeatedly examined and rejected claims of rate illegality and adverse impact on recycling in one proceeding after another including *Ex Parte No. 270 (Sub Nos. 5-6)*, *Ex Parte No. 281*, *Ex Parte No. 295 (Sub No. 1)*, and *Ex Parte No. 299* and now in *Ex Parte No. 319*. One of these analyses was sustained by this Court, another by a different panel of the lower court, and the present decision and impact statement is more thorough than either of these predecessors. See p. 4, n. 4, above. The Commission in its 300-page decision in this case and its 200-page environmental impact statement has given the subject the additional "hard look" required by Congress in Section 204, and it is time for the proceeding to be brought to a close, without the improper, wasteful and dangerous remand ordered by the lower court.

[35] NARI, representing non-ferrous recyclables, seeks to obtain a nationwide reduction in railroad rates for those recyclables despite the clear inadequacy of existing rail earnings; and ISIS, representing ferrous recyclables, seeks to restrict future increases, despite extraordinary inflation-generated cost increases that the railroads have suffered and continue to suffer in handling these same commodities.

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

HARRY N. BABCOCK
2700 Terminal Tower
P. O. Box 6419
Cleveland, Ohio 44101

RICHARD W. KIENLE
8 North Jefferson Street
Roanoke, Virginia 24042

WILLIAM C. LEIPER
P. O. Box 536
600 Grant Street
Pittsburgh, Pa. 15230

JOHN A. DAILY
1138 Six Penn Center Plaza
Philadelphia, Pa. 19104

MICHAEL BOUDIN
TIMOTHY A. HARR
888 Sixteenth Street, N.W.
Washington, D.C. 20006

JAMES L. TAPLEY
JAMES L. HOWE, III
P. O. Box 1808
Washington, D.C. 20013

JAMES E. SYKES
222 S. Riverside Plaza
Chicago, Illinois 60606

Attorneys for the Railroads

November 1978